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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1929.

ABIE STATE BANK, ABIE, NEBRASKA,
APPELLANT,

V.

ARTHUR J. WEAVER, AS GOVERNOR OF THE STATE OF NEBRASKA, AND CLARENCE G. BLISS, AS SECRETARY OF THE DEPARTMENT OF TRADE AND COMMERCE, APPELLEES.

ON APPEAL FROM THE SUPREME COURT OF NEBRASKA.

STATEMENT BY APPELLANTS OF GROUNDS OF JURISDICTION IN COMPLIANCE WITH RULE TWELVE OF THE SUPREME COURT OF THE UNITED STATES.

FRANK H. GAINES,
LEONARD A. FLANSBURG,
S. S. SIDNER,
Attorneys for Appellant.

WEILBRENNER-BRINEMAN CO., Law Briefs, Lincoln, Neb.

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FRANK H. GAINES,
LEONARD A. FLANSBURG,
S. S. SIDNER,
Attorneys for Appellant.

May It Please The Honorable Court:

This suit was instituted by the Abie State Bank, plaintiff, on behalf of itself and 558 other state banks, all chartered under the laws of the state of Nebraska, to en-

join the defendants, Arthur J. Weaver, governor of the state of Nebraska, and Clarence G. Bliss, secretary of the Department of Trade and Commerce of the state of Nebraska, from collecting special assessments, levied and to be levied, against these banks under the bank guarantee law of the state of Nebraska (R., Vol. 1, pp. 3-9).

Suit was brought in a state court, the District Court of Lancaster County, Nebraska (R., Vol. 1, p. 3).

The plaintiffs below, the appellants here, in their petition challenged the constitutionality, under the Constitution of the United States, of the statutes of Nebraska authorizing the levy of such special assessments. The statute complained of is Section 8028, Compiled Statutes of Nebraska 1922, as amended by Section 26, Chapter 191, Laws of 1923, which reads as follows (R., Vol. 1, p. 78):

> "If the depositors' guarantee fund shall, from any cause, be depleted or reduced to any amount less than one per cent of the average daily deposits as shown by the last semi-annual assessment statement thereof filed, the department of trade and commerce shall levy a special assessment against the capital stock of the corporations governed by the provisions of this article, to cover such deficiency, which special assessment shall be based on the said average daily deposits, and, when required for the purpose of immediate payment to depositors, said special assessment may be for any amount not exceeding one per cent of said average daily deposits for the year 1923 and thereafter not exceeding one-half of one per cent of said average daily deposits in any one year."

The plaintiff's petition (R., Vol. 1, pp. 3-9) declared that the guarantee fund accumulated under the bank guarantee law of the state of Nebraska, had not only been completely exhausted but that liabilities against the fund

exceeded the assets available for the fund by the amount of $16,000,000.00, and that to compel further assessments against the existing banks destroyed their own resources and weakened the security for their own depositors, and that the operation of the law could no longer be justified as bearing any rational relation to a public purpose, and was, in fact, destroying protection to depositors rather than providing protection.

The petition further declared that the plaintiff banks were unable to make compensatory earnings upon their capital and pay such assessments, and that the assessments were confiscatory of their earnings and destructive of the banks; that the special assessments, by reason of the insolvent condition of the bank guarantee fund, had become regular, and that the total yearly tax under the guarantee law against the banks amounted to a rate of 8 per cent upon their capital.

The special assessment due at the time the suit was brought amounted to over $620,000.00, and subsequent assessments, levied each six months thereafter and covered in this litigation, now altogether total more than $3,000,000 (R., Vol. 1, p. 61).

The total capital of the existing state banks in Nebraska was, at the time of the commencement of the suit, $19,000,000.00 (R., Vol. 1, p. 61).

Since 1919 the state banks have paid into the guarantee fund $14,000,000.00 (R., Vol. 1, p. 80), and yet the fund was completely exhausted and stood with a deficit of about $16,000,000.00. For two years prior to the commencement of this suit two-thirds had been unable to pay dividends.

The petition further declared that a large majority of the banks, 110 in number, had been chartered prior to the passage of the bank guaranty law, and had, prior to that time, invested in properties peculiarly fitted for banking purposes and which depended largely for their value upon the continuance of such use, and that the value of such properties would be in great part destroyed in case of a discontinuance by those institutions of the banking business, individuals being prohibited from doing a banking business in the state, and the plaintiffs by their petition declared that the operation of the law was not justified under the police power in its operation, bore no rational relation to any public purpose, and was confiscatory of the properties and earnings of the banks, took their properties and earnings without due process of law, and was "illegal, unjust and confiscatory and unconstitutional and in violation of the Fifth Amendment of the Constitution of the United States and in violation of the Fourteenth Amendment of the Constitution of the United States" (R. Vol. 1, p. 7).

Upon a trial in the district court that court found that the statute complained of was unconstitutional and in violation of the Federal Constitution and granted an injunction against the collection of all future special assessments. In the opinion filed by that court the court said (R. Vol. 1, p. 68):

> "Now the only possible purpose in levying special assessments under the Guaranty Fund Law is to pay depositors in failed banks whose claims have already been adjudicated. Present day depositors cannot possibly receive any benefit therefrom. Such a situation was not in the mind of Justice Holmes when he wrote the opinion sustaining the constitutionality of the law. He justified an 'insignificant taking' on

> the ground that the banks, by contributing to the Depositors Guaranty Fund, would create a condition that would make the currency of checks secure, would make safe the resort of depositors to state banks and would make failures almost impossible. Of course, he could not then foresee the great war or the accompanying inflation which followed, or the reaction that followed the later curtailment of credits. The Guaranty Fund Law as conceived by Justice Holmes is no longer serving its purposes."

And in an extended analysis of the evidence, that court further pointed out that the assessments were confiscatory, prevented compensatory returns, and took the earnings and properties of the banks for private use and without due process of law (R., Vol. 1, p. 68).

In the decree entered by the district court, the court further found (R., Vol. 1, pp. 51-52):

> "That the burden of paying such assessments by the state banks, instead of strengthening the state banking system and protecting depositors of state banks, has just the contrary effect, and, to the extent of the burden imposed by such assessments, makes said banks less able to meet the demands of their current depositors and less able to keep their banks solvent; that the said special assessment is not now being levied for any public purpose, but is being levied for the sole and only purpose of paying claims of depositors in failed banks, which claims have been allowed, and will not and cannot be used for the purpose of creating a fund for the stabilizing of banking conditions in the State of Nebraska.
>
> "The court further finds that the levy and collection of such special assessment specifically complained of in the plaintiff's petition, is unreasonable, unjust, oppressive and confiscatory and not, under present conditions, a proper exercise of nor justified by the police power of the state, and that the provision of

> Section 8028, Compiled Statutes 1922, providing for such special assessments, is, under the facts and conditions shown to exist in this case, unreasonable, unjust, oppressive and confiscatory and void and unconstitutional, and in violation of the 5th Amendment of the Constitution of the United States and of the 14th Amendment of the Constitution of the United States, in that it deprives the plaintiff, Abie State Bank, and the state banks on behalf of whom this suit is brought, of their property without due process of law, and denies them the equal protection of the law."

On appeal to the Supreme Court of Nebraska, filed on May 31, 1929 (R., Vol. 1, p. 2), that court being the highest court, and the court of last resort, in that state, the decision of the trial court was reversed, upon the sole ground that the statute was not unconstitutional, and that the assessments did not constitute the taking of private property without due process of law, the judgment of the Supreme Court reciting (R., Vol. 1, p. 75):

> "This cause coming on to be heard upon appeal from the district court of Lancaster County, was argued by counsel and submitted to the court; upon due consideration whereof, the court finds error apparent in the record of the proceedings and judgment of said district court in that, contrary to the findings of that court, the levy of a special assessment upon the state banks pursuant to the provisions of Section 8028, Compiled Statutes 1922, as amended by Section 26, Chapter 191, Laws of 1923, does not constitute the taking of private property without due process of law. It is, therefore, considered, ordered and adjudged that the temporary injunction granted herein by said district court be, and hereby is, dissolved, the judgment is reversed and the action is hereby dismissed."

In the opinion of the Supreme Court of Nebraska, the court, recognizing the confiscatory character of the tax and giving no heed to changed conditions, nevertheless held that it was bound by the former decisions of the Supreme Court of the United States in *Noble Bank* v. *Haskell*, and companion cases, the court in its opinion saying (R., Vol. 1, pp. 82-83):

> "In the present case, the trial court found that the guaranty fund was confiscatory, and that its enforcement constituted the taking of private property without due process, and that there should therefore be an indefinite abatement of the enforcement of the act until such time as such enforcement could be made without mischievous consequences. It may be observed, however, that the bank guaranty fund law has been held by the highest court in the land to be a constitutional act and well within the meaning of the federal Constitution.
>
> "Substantially like questions as here involved were considered and decisions were rendered by the Supreme Court of the United States in *Noble State Bank* v. *Haskell*, 219 U. S. 104, and *Assaria State Bank* v. *Dolley*, 219 U. S. 121, and in both cases it was held that the act was not repugnant to the provisions of the Constitution."

In the fourth syllabus of the opinion of the Supreme Court of Nebraska the law was declared to be constitutional in the following language (R., Vol. 1, p. 77):

> "Where a special assessment has been levied upon the state banks pursuant to the provisions of Section 8028, Comp. St. 1922, as amended by Section 26, Ch. 131, Laws of 1923, such assessment does not constitute the taking of private property without due process."

It may be contended that the Supreme Court of Nebraska based its decision in part upon the proposition that the banks had waived their right to raise the constitutional question. Such a proposition is not mentioned in the judgment of the court just referred to. The body of the court's opinion, likewise, does not so hold nor declare, but the third syllabus of the court's opinion reads as follows (R., Vol. 1, p. 77):

> "Where a state bank has accepted the benefits arising from the deposits of money pursuant to the terms of the bank depositors' guaranty law, such bank should not be heard, in a proper case, to make complaint of a special assessment upon such deposits which has been levied for the benefit of the depositors' guaranty fund."

In answer to that contention we will urge:

I.

The judgment of the Supreme Court of Nebraska (R. Vol. 1, p. 75), above quoted, which controls the opinion, shows that the sole ground of the decision of the court was that the law was not unconstitutional.

II

A great majority of the banks, 110 in number of the complaining banks, had received charters and were operating before the enactment of the bank guaranty law; they had no election by which they could come under the law or stay from under it when it was enacted, and their compelled operation under the law could not work a waiver of their rights.

Union Pacific R. Co. v. Public Service Commission, 63 L. Ed. 131, 248 U. S. 67.

Ward v. Love County, 64 L. Ed. 751, 253 U. S. 17.

Western Union Tel. Co. v. State of Kansas, 54 L. Ed. 355, 216 U. S. 1. (See Justice White's concurring opinion.)

III.

To hold that the banks had waived their rights would be a holding palpably unfounded by the record, and that question is resolved as a matter of law, since the testimony on that subject is without material conflict.

IV.

The Supreme Court of Nebraska in its opinion refers to the newspaper advertising of the guarantee fund law by the banks. The material for such advertising was furnished to the newspapers by the Department of Trade and Commerce of the State of Nebraska (R., Vol. 2, p. 212, Q. 1109), and it was the finding of the district court, unquestioned by the supreme court, that (R., Vol. 1, p. 66):

> "They (the banks) contend that when they were stressing the advantages of that law they did not know the actual conditions of the state banks. That undoubtedly was true."

V.

The case is one which deserves to be heard on the merits.

The Baltimore & Ohio R. R. Co. v. State of Maryland, 20 Wall. 643, 22 L. Ed. 446.

The Supreme Court of Nebraska considered and determined the constitutionality of the Nebraska statute, and by its decision, entered on December 7, 1929 (R., Vol. 1, p. 75), the constitutionality thereof was sustained.

Motion for rehearing was filed on January 10, 1930, within the time allowed, and this motion overruled on January 18, 1930, and a rehearing denied (R., Vol. 1, p. 87).

Final judgment, by such ruling, was entered against plaintiffs below, and appellants here, on January 18, 1930.

Petition for order allowing appeal was filed with the Supreme Court on February 13, 1930 (R., Vol. 1, p. 90), together with assignments of error, setting forth, on the several grounds hereinbefore mentioned, that the statute complained of and the special assessments provided for were unconstitutional and in violation of the Fourteenth Amendment to the Constitution of the United States, and constituted the taking of property of the plaintiff banks without due process of law.

The Chief Justice of the Supreme Court of Nebraska, by order duly entered, allowed an appeal to the Supreme Court of the United States on February 13, 1930 (R., Vol. 1, pp. 96, 98).

Order for appeal was also procured and entered on February 13, 1930, through the clerk of the District Court of the United States for the District of Nebraska (R., Vol. 1, pp. 100-101).

Citation, addressed to all of the parties in the case, was issued and service of same and the entrance of appearance of all of such parties acknowledged by signature upon such citation, the citation being returned and filed February 19, 1930 (R., Vol. 1, pp. 103, 104, 105).

Bond for appeal was given, duly approved and filed with the Supreme Court of the State of Nebraska, in com-

pliance with the order of that court (R., Vol. 1, pp. 107-108).

Praecipe for the making and transmission of the record to the Supreme Court of the United States was duly served and filed on February 19, 1930 (R., Vol. 1, pp. 112-115).

The case was docketed in this Court on March 18, 1930.

The constitutional question was made the basis of the plaintiff's petition, attacking the bank guarantee law statute referred to. The judgment sought to be reversed is a final one by the Supreme Court of Nebraska, which is the court of last resort in that state. The validity of the Nebraska statute was directly challenged by the proper procedure as violating the Fifth and Fourteenth Amendments of the Constitution of the United States, and as operating to take the property of the plaintiff banks without due process of law. The Supreme Court of Nebraska has decided that constitutional question in favor of the statute.

The jurisdiction of this Honorable Court is claimed under Section 237a (U. S. C. A. Sec. 344a) of the Judicial Code as amended by the Act of February 13, 1925.

The right of appeal is justified under Title 28, Sections 861a and 861b U. S. C. A., being Sections of the Judicial Code as amended by Acts of January 31, 1928, and April 26, 1928, and the appeal is supported by the following decisions:

Nashville, C. & St. L. Ry. v. *White*, 278 U. S. 456, 73 L. Ed. 452.

Great Northern R. Co. v. *State of Minnesota*, 278 U. S. 503, 73 L. Ed. 477.

The Supreme Court of Nebraska expressly overruled appellants' claim of unconstitutionality, and by its opinion and judgment actually enforced and applied said state statute under attack against the appellants (R., Vol. 1, p. 75). The validity of this statute is therefore subject to attack here.

Fiske v. *Kansas,* 274 U. S. 380, 71 L. Ed. 1108.

The constitutional question was raised as soon as possible, being the basis of and expressly set forth in the plaintiff's petition (R., Vol. 1, p. 7). This constitutional question was expressly ruled upon by the district court (R., Vol. 1, pp. 50, 52), and was again affirmatively passed upon by the supreme court and made the sole ground for its judgment and reversal of the case, as shown by its judgment and journal entry (R., Vol. 1, p. 75). This complied in full with the requirements of law as announced in *Mellon* v. *O'Neil,* 275 U. S. 212, 72 L. Ed. 245.

It is respectfully submitted that this Court has jurisdiction of this cause on appeal.

Copy of this statement has been served upon adversary counsel and proof of such service filed with the Clerk of this Court.

Respectfully submitted,

ABIE STATE BANK,

For itself and in behalf of all banks for whom this suit was brought.

By .....

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Attorneys.